

# SIM & DEPAOLA LLP

*Attorneys-at-Law*

42-40 Bell Boulevard - Suite 405  
Bayside, New York 11361  
(718) 281-0400

April 7, 2023

**VIA ECF**

Honorable Denise L. Cote  
United States District Judge  
United States District Court  
Southern District of New York  
500 Pearl Street  
New York, New York 10007

Re: *Damien Guarniere v. City of New York, et al.*  
Docket No. 21-cv-1739 (DLC)

Dear Judge Cote,

The Plaintiff, Mr. Damien Guarniere, by the undersigned counsel, respectfully submits this letter motion, pursuant to Rules 59(e) and 60(b)(1) of the Federal Rules of Civil Procedure, for reconsideration of the Memorandum Opinion and Order (Doc. 111) granting defendants' motions to dismiss pursuant to Rule 41(b), together with such other or further relief as the Court may deem just and proper.

It is respectfully submitted that the Court should reconsider and vacate the Order dismissing this action for failure to prosecute for the following reasons. The untimely submission of Plaintiff's opposition to Defendant City's motion to dismiss under Rule 41(b) resulted from an apparent filing error that prevented Plaintiff's response and supporting documents from being electronically filed yesterday evening, as intended and believed.

The filing mishap was further compounded by my absence from the office this morning due to child-care obligations. As such, I did not become aware of the electronic filing failure until reviewing the Memorandum Opinion and Order by Your Honor, at which time I refiled Plaintiff's opposition (Doc. 112) and supporting documents, including Plaintiff's Proposed Exhibit List (Doc. 112-1), Proposed Request to Charge (Doc. 112-2) and Proposed Verdict Sheet (Doc. 112-3).

Plaintiff apologizes to the Court and counsel for failing to comply with the Order of the Court to submit his response by April 6, 2023, as such was completely inadvertent, unintentional and unbeknownst to the undersigned until this afternoon.

Plaintiff now respectfully moves for reconsideration of the Order dismissing this case for failure to prosecute, as the Order was predicated primarily upon Plaintiff's failure to oppose Defendant City's motion to dismiss under Rule 41(b), dated April 3, 2023 (Doc. 93). Upon

advising defendants of Plaintiff's intention to file the instant motion for relief, both defendants expressed their opposition without explanation.

Wherefore, Plaintiff respectfully moves this Court, pursuant to Rules 59(e) and 60(b)(1), to reconsider, alter, amend or vacate the Order of the Court, dated April 7, 2023, for dismissal of the instant action for failure to prosecute, pursuant to Rule 41(b), and to reopen the case, together with such other or further relief as the Court may deem just and proper.

Thank you for your consideration herein.

Respectfully submitted,

/s/ Samuel C. DePaola  
Samuel C. DePaola, Esq.  
Attorney for Plaintiff  
[sdepaola@simdepaola.com](mailto:sdepaola@simdepaola.com)